A

YAW CHUN SOON v. NEWFIELDS LAND SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG CHEE LIN J
[SUIT NO: WA-22NCC-7-01-2019]
28 JUNE 2019

B

CIVIL PROCEDURE: *Striking out – Application for – Parties entered into share sale agreement ('SSA') – Purchaser of shares refused to allow company to date sale and purchase agreements and memorandum of transfer – Dating of agreement conditional upon occurrence of certain events – Whether such events have*

C

materialised – Company claimed against purchaser of shares for breach of obligations under contract – Whether obligation under SSA due to be performed – Whether purchaser of shares in breach of obligations under SSA – Whether there were issues to be tried – Whether claim ought to be struck out

D

CONTRACT: *Agreement – Breach – Allegation of – Parties entered into share sale agreement ('SSA') – Purchaser of shares refused to allow company to date sale and purchase agreements and memorandum of transfer – Dating of agreement conditional upon occurrence of certain events – Company claimed against purchaser of shares for breach of obligations under contract – Whether purchaser of shares in breach of obligations under SSA – Whether obligation under SSA due to be*

E

performed – Whether claim premature – Whether company entitled to rescind agreement – Contracts Act 1950, s. 40

The defendant entered into a share sale agreement ('the SSA') with the plaintiff where the latter agreed to sell his 49% equity in Ardent Housing

F

Development Sdn Bhd ('Ardent') to the former, made up of 245,000 ordinary shares and 4,410,000 preference shares ('shares'). At the material time, the defendant was holding 51% equity in Ardent. Two agreements were entered into, namely, (i) a supplemental infrastructure costs share agreement ('supplemental IFCSA') between Ardent and Platinum 88 Sdn Bhd

G

('Platinum 88'); and (ii) a settlement agreement between the plaintiff, the defendant and Ardent ('settlement agreement'). Pursuant to cl. 4.2(c) and item D, para. (iii), fifth schedule of the SSA ('item D'), the defendant shall cause Ardent to sign the sale and purchase agreements ('SPAs') and memorandum of transfer ('MOT') for four units of terrace houses ('terrace units') in favour of the plaintiff's nominee, Strategi Kemajuan Sdn Bhd

H

('Strategi') and deliver the same to the plaintiff's solicitors, to be held in escrow. The defendant paid the plaintiff a sum of RM137,000 and delivered the SPAs and MOT for the terrace units executed by Ardent to the plaintiff's solicitors to be held in escrow. Pursuant to item D, para. (vi), fifth schedule of the SSA, the defendant undertook to cause Ardent to execute the SPA for

I

a unit of townhouse/villa ('townhouse') in favour of Strategi within four years from the date of the SSA, which was 21 March 2016, by 20 March 2020. The defendant duly executed the SPA for the townhouse. However,

the SSA did not stipulate the time and manner in which the SPA for the townhouse was to be effected. The plaintiff claimed against the defendant, premised on s. 40 of the Contracts Act 1950, based on the allegation that the defendant breached its obligations under the SSA, *inter alia*, by refusing to allow the plaintiff to date the SPAs and the MOT in escrow for the terrace units. The defendant, on the other hand, filed the present application to strike out the plaintiff's claim. The plaintiff raised issues which, it submitted, should go for trial, namely (i) the defendant did not have any advertising permit and developer licence for one of the terrace units on the date of the SSA and/or the settlement agreement; (ii) the defendant had admitted that it made an application to change the building plan and this had the effect of disabling the defendant from performing the terms of the SSA; and (iii) the defendant breached s. 123 of the Companies Act 2016 ('CA') as, pursuant to the SSA, Ardent had given financial assistance to the defendant in order for the defendant to purchase shares in Ardent in which the defendant was a shareholder.

Held (allowing application; striking out plaintiff's action):

(1) The defendant could not have breached the SSA when its obligation under the SSA was not due to be performed yet. In so far as the terrace units were concerned, based on the SSA, the dating of the SPAs and MOT in escrow was conditional upon the occurrence of either of two events, whichever was earlier, (i) the completion and commissioning of portion 1A of the integrated water supply system 1A and 1B ('IWSS 1A and 1B') with certificate of completion; or (ii) the launch of Ardent's project of developing some parcels of land from Platinum 88 ('the lands') ('Ardent's project'). It was not in dispute that Ardent's project had not been launched to date while portion 1A of the IWSS 1A and 1B was handed over to SYABAS and ready to be commissioned pursuant to a Form QT11 dated 2 October 2018. Therefore, based on item D, 2 October 2018 was the entitlement date. The plaintiff was only allowed to date the SPAs and the MOT for the terrace units after the expiry of 24 months from 2 October 2018 *ie*, on 3 October 2020. In so far as the townhouse was concerned, the SSA did not stipulate the time and manner in which the SPA for the townhouse was to be effected (*eg*, the 'entitlement date' or the dating of the SPA). (para 18)

(2) If the only possible dates for completion and commissioning of portion 1A of the IWSS 1A and 1B were the date of the certificate of practical completion and the date of the Form QT11, and the parties had confirmed that the applicable date could only be one of the two date, the latter date would be the applicable date. The certificate of practical completion only certified the completion of the physical works. The commissioning must come subsequently to the physical completion of

A the works. On this basis, the plaintiff was only entitled to date the SPAs and the MOT for the terrace units after the expiry of 24 months from 2 October 2018, *ie*, on 3 October 2020. On this basis, the plaintiff's claim would be premature. (para 20)

B **(3)** The fact the defendant did not have an advertising permit and developer's licence for one of the terrace units, at the date of the SSA, gave rise to an issue to be tried. The relevant time when the advertising permit and developer's licence was required was when the SPAs were to be dated or when Ardent's project was to be launched, which had yet to happen. Until the SPAs were dated, there was no sale of the properties C and the question of the advertising permit and the developer's licence had not come into picture yet. (para 25)

(4) Assuming the defendant had disabled itself from performing its obligations under the SSA in respect of the terrace units, the defendant would still have partially performed its obligations under the SSA in D paying the sum of RM137,000 to the plaintiff and in fulfilling its obligations in respect of the townhouse. In that case, the plaintiff should not be entitled to rescind the SSA. (para 31)

(5) There was no breach of s. 123 of the CA. The plaintiff's contention ignored the rationale of the payment arrangement as set out in the E settlement agreement which could be summarised as (i) at the time of the SSA, Ardent was owing RM9,445,778.56 to the defendant; and (ii) pursuant to the SSA, (a) the defendant owed the plaintiff the balance purchase price totalling to RM4,518,000; and (b) the plaintiff owed Ardent the purchase price for the terrace units amounting to F RM4,518,000. Therefore, the parties agreed to set-off or contra their respective debts by way of the defendant paying to the purchase price for the terrace units and townhouse on behalf of the plaintiff. The alleged breach of s. 123 of the CA was not an issue to be tried. (paras 34, 35 & 38)

G **Case(s) referred to:**

Audrey Gertrude De Souza v. Sunway D'Mont Kiara Sdn Bhd [2015] 4 CLJ 853 CA ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

H *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC* ***(refd)***

Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors [1997] 3 CLJ 421 HC ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 CA ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

I *Stewart Wells Hill & Robert Thomson Hill v. Stewart Milne Group Ltd & Gladedale (Northern) Ltd [2016] CSIH 35* ***(refd)***

Tan Tien Seng & Anor v. Grobina Resorts Sdn Bhd [2005] 7 CLJ 70 HC ***(refd)***

Wan Ming Sun v. Planet Uno Sdn Bhd [2014] 10 CLJ 119 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 40
Companies Act 1965 (since repealed), s. 67
Companies Act 2016, ss. 123, 124
Housing Development (Control and Licensing) Regulations 1989, reg. 5
Rules of Court 2012, O. 18 r. 19(1)
Water Services Industry Act 2006, s. 47
Water Services Industry (Water Reticulation And Plumbing) Rules 2014, r. 29(2)(c), Tenth Schedule

For the plaintiff - Marcus Tan & Eunice Ng; M/s Ricky Tan & Co
For the defendant - Bahari Yeow Tien Hong & Ho Ai Ting; M/s Lee Hishamuddin Allen & Gledhill

Reported by Najib Tamby

JUDGMENT

Wong Chee Lin J:

[1] This is an application by the defendant to strike out the claim of the plaintiff. I have allowed the application. These are the full reasons for my decision.

Salient Background Facts

[2] On 21 March 2016, the defendant entered into a share sale agreement dated 2 March 2016 with the plaintiff ("share sale agreement") where the plaintiff agreed to sell his 49% equity in Ardent Housing Development Sdn Bhd ("Ardent") to the defendant, made up of 245,000 ordinary shares and 4,410,000 preference shares ("shares").

[3] As at the date of the share sale agreement, the defendant already held 51% equity in Ardent.

[4] On 21 March 2016, the following two agreements were entered into:

(i) A supplemental infrastructure costs share agreement ("supplemental IFCSA") between Ardent and Platinum 88 Sdn Bhd ("Platinum 88"); and

(ii) A settlement agreement with *inter alia*, the plaintiff, the defendant and Ardent ("settlement agreement").

[5] The relation between the share sale agreement and the supplemental IFCSA is as follows:

(i) Ardent purchased some parcels of land from Platinum 88 at Ukay Bistari, Melawati ("lands");

(ii) Ardent will be developing the lands into a housing development ("Ardent's project");

(iii) At the time of the share sale agreement, the developers surrounding the lands had been tasked by Syarikat Bekalan Air Selangor ("SYABAS") to build a permanent/integrated water supply system ("PWSS") to provide permanent water supply to the developments in the vicinity of Ardent's project. The developers entered into agreements amongst themselves to build the PWSS on a cost-sharing basis ("PWSS agreements");

(iv) As Ardent is not a party to the PWSS agreements and to ensure Ardent's project is fully connected and integrated to the PWSS, Ardent and Platinum 88 entered into two agreements ie, infrastructure cost share agreement ("IFCSA") and the supplemental IFCSA. The net effect of the IFCS and supplemental IFCSA is that:

(a) The portion of the PWSS affecting the lands is referred to as the integrated water supply system 1A & 1B ("IWSS 1A & 1B");

(b) Pursuant to the IFCSA, Platinum 88 agreed and undertook to complete and commission the IWSS 1A & 1B with certificate of completion by 31 October 2014 to enable Ardent's project to be fully connected and integrated to the PWSS for the purpose of securing certificate of completion and compliance;

(c) As the IWSS 1A & 1B was not completed and commissioned by 31 October 2014, Platinum 88 and Ardent entered into the supplemental IFCSA to, among others, revise the scope and schedule of works for the IWSS 1A & 1B to become only portion 1A of the IWSS 1A & 1B;

(d) Pursuant to the supplemental IFCSA, Platinum 88 represented that portion 1A of the IWSS 1A & 1B will be completed and commissioned with certificate of completion by 30 June 2016, otherwise, Platinum 88 is liable to pay Ardent liquidated ascertained damages in the sum of RM5,000 a day from 1 July 2016 until the portion 1A of the IWSS 1A & 1B is completed and commissioned with certificate of completion.

(v) The parties agreed to pay the purchase price of the shares amounting to RM4,655,000 ("purchase price") in the following manner:

(a) The defendant shall pay the plaintiff a sum of RM137,000 upon execution of the share sale agreement;

(b) The balance purchase price totalling RM4,518,000 is to be paid to the plaintiff by way of the defendant paying to Ardent the purchase price of four units of terrace houses ("terrace units") and one unit of townhouse/villa ("townhouse") on behalf of the plaintiff.

[6] The rationale behind the payment arrangement detailed in para. 2.5(b) above is stated in the settlement agreement, as can be summarised below:

(i) at the time of the share sale, Ardent was owing RM9,445,778.56 to the defendant;

(ii) pursuant to the share sale agreement:

(a) the defendant owes the plaintiff the balance purchase price totalling RM4,518,000;

(b) the plaintiff owes Ardent the purchase price for the terrace units and townhouse amounting to RM4,518,000.

(iii) therefore, parties agreed to set off or contra their respective debts by way of the defendant paying to Ardent the purchase price for the terrace units and townhouse on behalf of the plaintiff.

[7] Pursuant to cl. 4.2(c) and item D para. (iii) fifth schedule of the share sale agreement, the defendant shall cause Ardent to sign the sale and purchase agreements ("SPAs") and memorandum of transfer ("MOT") for the terrace units in favour of the plaintiff's nominee, Strategi Kemajuan Sdn Bhd ("Strategi") and deliver the same to the plaintiff's solicitors to be held in escrow.

[8] The defendant had paid the plaintiff a sum of RM137,000 and delivered the SPAs and MOT for the terrace units executed by Ardent to the plaintiff's solicitors to be held in escrow.

[9] Pursuant to item D para. (v), fifth schedule of the share sale agreement, the defendant undertook to cause Ardent to execute the sale and purchase agreement for the townhouse in favour of the Strategi within four years from the date of the share sale agreement (21 March 2016) ie, by 20 March 2020. The defendant had executed the sale and purchase agreement for the townhouse.

[10] Item D para. (vi), fifth schedule of the share sale agreement provides that:

> By a Supplemental Infrastructure Cost Share Agreement dated 21 March 2016, it was agreed by the parties therein that the Portion 1A of the IWSS 1A & 1B shall be completed and commissioned with certificate of completion by 30 June 2016. For the purpose of computation under this clause herein, the date of 30 June 2016 or the date when the Portion 1A of the IWSS 1A & 1B shall actually be completed and commissioned with certificate of completion (if any), whichever is later, shall be referred to as the "Entitlement Date". Accordingly, the Vendor's Solicitors are irrevocably authorised by the parties herein to date the SPA and MOT in Escrow for the Terrace Units at any time after the expiry of 24 months from the Entitlement Date or 12 months from the launch of sale of the Project, whichever is earlier.

[11] The share sale agreement does not stipulate the time and manner in which the sale and purchase agreement for the townhouse is to be effected (eg, the 'entitlement date' or the dating of the sale and purchase agreement).

Law On Striking Out

[12] The principles on striking out of pleadings are trite – O. 18 r. 19(1) RC 2012, *Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, SC.

[13] It is settled law that a claim would be struck out if on the face of it, is plainly and obviously unsustainable – *Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd*, SC.

[14] In *Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606, the Supreme Court held that "the lower court should have also scrutinised the evidence in order to decide whether the action was bound to fail".

[15] In *Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & Ors* [1996] 1 CLJ 257, the Court of Appeal set out the guiding principles on evaluation of affidavit evidence:

> Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (See *Mckay & Anor v. Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890)
>
> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400.) Likewise, where the affidavit evidence discloses with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

Findings Of The Court

[16] In essence, the plaintiff's claim is primarily premised on its allegation that the defendant has breached its obligations under the share sale agreement, among others, by refusing to allow the plaintiff to date the SPAs and MOT in escrow for the terrace units.

[17] It is the contention of the defendant that it could not have breached the share sale agreement when its obligation under the agreement is not due to be performed yet.

[18] The facts below will show that the defendant could not have breached the share sale agreement when its obligation under the share sale agreement is not due to be performed yet:

(i) In so far as the terrace units are concerned, based on the terms of share sale agreement, the dating of the SPAs and MOT in escrow is conditional upon the occurrence of either of two events, whichever is earlier;

(a) the completion and commissioning of portion 1A of the IWSS 1A & 1B with certificate of completion; or

(b) the launch of sale of Ardent's project.

(ii) It is not disputed that Ardent's project has not been launched to date;

(iii) Portion 1A of the IWSS 1A & 1B was handed over to SYABAS and ready to be commissioned by SYABAS on 2 October 2018 pursuant to a Form QT 11 dated 2 October 2018 issued by SYABAS;

(iv) Therefore, based on item D para. (vi), fifth schedule of the share sale agreement, 2 October 2018 is the entitlement date. The plaintiff is only allowed to date the SPAs and MOT for the terrace units after the expiry of 24 months from 2 October 2018, ie, on 3 October 2020;

(v) In so far as the townhouse is concerned, the share sale agreement does not stipulate the time and manner in which the sale and purchase agreement for the townhouse is to be effected (eg, the 'entitlement date' or the dating of the sale and purchase agreement).

[19] The plaintiff contends that the entitlement date fell on 24 September 2016 with the completion and commission of portion 1A of the IWSS 1A & 1B with a certificate of practical completion ("CPC") dated 24 September 2016. It is submitted for the defendant that such contention is misconceived for the following reasons:

(i) The entitlement date cannot be 24 September 2016 as the CPC (certificate of practical completion) is not a "certificate of completion";

(ii) The CPC only certified the completion of the physical construction works;

(iii) The CPC does not state nor does it certify the commissioning of portion 1A of the IWSS 1A & 1B;

(iv) "Commissioning" is defined by Chow Kok Fong in *Construction Contracts Dictionary* (2006, Thomson Sweet & Maxwell Asia) to mean:

> v. – The activation and monitoring of the systems of a building or facility as part of a programme to determine the extent to which the systems are capable of functioning according to the

A

> requirements as prescribed in their design and to prepare the systems for their intended operation. Commissioning is usually towards the end of the construction or upon completion of the construction ...

(v) In *Stewart Wells Hill & Robert Thomson Hill v. Stewart Milne Group Ltd* B *& Gladedale (Northern) Ltd* [2016] CSIH 35, the Scottish Court of Appeal, in discussing the meaning of 'completed and commissioned' held:

> [31] As already noted, parties were agreed that "commissioned" meant "made operational and therefore C capable of being put to use by those entitled to inhabit the houses served by the systems". On that definition I would see the requirements of cl. 2.13 as having been met as at December 2008 insofar as the "commissioned" aspect of "completed and commissioned" is concerned. As appears from the sheriff's findings-in-fact the systems were connected by that date and D were working to drain the MTS site. On the basis of the same facts, giving the word its natural and ordinary meaning, it can also be said that the systems were "completed". They certainly had been physically constructed. As can be seen from chapters 4 and 5 of the Guide, the fact that the MTS systems have been connected to the public sewer means that Scottish Water has E been satisfied with the design of the systems, has issued a permit to connect, has carried out a site inspection and been satisfied as to the completion of that work. Thus, looking to the natural and ordinary meaning of the phrase, it can be said that the systems were "completed and commissioned" by December 2008. That conclusion is reinforced if it is to be F inferred from the order of the words that commissioning is something that comes after completion, as would seem to make sense. What I mean by that is that the word order suggests the stage indicated by "completed" is a stage necessarily prior to the stage indicated by "commissioned". As I took Mr Bartos to accept, the fact that the systems were G operational meant that the "commissioned" stage had been reached. Thus, if word order is meant to indicate time sequence, the fact that the systems have been "commissioned" means that they must previously have been "completed".
>
> [48] ... the parties had clearly reached an agreement with H declared purposes focussing on the practical outcome of completed and commissioned systems, which comply with the various planning and statutory requirements for such systems ... .

(vi) The Form QT 11 dated 2 October 2018 issued by SYABAS is a I standard form prescribed in the Tenth Schedule of the Water Services Industry (Water Reticulation And Plumbing) Rules 2014 ("WSI Rules"), read with s. 47 Water Services Industry Act 2006 ("WSIA").

(vii) Rule 29 of the WSI Rules states:

> 29. Handing over of external water reticulation system and supply main
>
> (1) Upon the issuance of the certificate of compliance of external water reticulation system or supply main by a qualified person under section 47 of the Act, a developer shall apply to a water distribution license in the form prescribed in the Ninth Schedule to hand over the operation and maintenance of the external water reticulation system or supply main to the water distribution licensee.
>
> (2) Where the water distribution license is satisfied that:
>
> (a) all requirements set out in the approved plans and specifications and the recognised standards are met;
>
> (b) the as built drawings of the external water reticulation system or supply main certified by the qualified person have been submitted to the water distribution licensee; and
>
> (c) the external water reticulation system or supply main has been completed and every part thereof is in proper working order and where applicable, the necessary spares for any pumping equipment have been supplied, the water distribution license shall accept the handing over of the external water reticulation system or supply main at no cost for use as a public water supply system by issuing the form prescribed in the Tenth Schedule to the developer.

(viii) Therefore, reading the definition/meaning of "commissioning" and r. 29(2)(c) of the WSI Rules, it would appear that the issuance of Form QT 11 by SYABAS has three significance:

(i) SYABAS is satisfied that Portion 1A of the IWSS 1A & 1B has been completed and every part thereof is in proper working order;

(ii) Portion 1A of the IWSS 1A & 1B has been handed over to SYABAS;

(iii) Portion 1A of the IWSS 1A & 1B is 'commissioned" in that the systems are capable of functioning according to the requirements as prescribed in their design and ready for their intended operation.

(ix) Based on the foregoing, it is submitted for the defendant that the date of "commissioning" is the date of the issuance of Form QT11 ie, 2 October 2018 where portion 1A of the IWSS 1A & 1B was handed over to SYABAS or anytime thereafter, signifying that portion 1A of the IWSS 1A & 1B was completed and every part thereof is in proper working order and capable of functioning according to the requirements as prescribed in their design and ready for their intended operation.

A (x) Accordingly, based on item D para. (vi), fifth schedule of the share sale agreement, 2 October 2018 is the entitlement date. The plaintiff is only allowed to date the SPAs and MOT for the terrace units after the expiry of 24 months from 2 October 2018, ie, on 3 October 2020.

B **[20]** If the only possible dates for completion and commissioning of portion 1A of the IWSS 1A & 1B are the date of the certificate of practical completion and the date of the Form QT 11, and the parties had confirmed to me that the applicable date can only be one of the two dates, I am of the view that the latter date would be the applicable date. The certificate of practical completion only certified the completion of the physical works. C The commissioning must come subsequently to the physical completion of the works. On this basis, I am of the view that the plaintiff is only entitled to date the SPAs and MOT for the terrace units after the expiry of 24 months from 2 October 2018 ie, on 3 October 2020. On this basis, the plaintiff's claim would be premature.

D **[21]** However, the plaintiff has raised other issues which it submits should go for trial. I will now consider those issues.

[22] The plaintiff alleged that the defendant did not have any advertising permit and developer licence for Lot 1706 which is one of the terrace units E on the date of the share sale agreement and/or the settlement agreement. Pursuant to reg. 5 of the Housing Development (Control and Licensing) Regulations 1989, no advertisement or sale shall be made by any housing developer without an advertisement and sale permit having first been obtained from the Controller.

F **[23]** The plaintiff relied on the case of *Wan Ming Sun v. Planet Uno Sdn Bhd* [2014] 10 CLJ 119 wherein the Court of Appeal held as follows:

> [13] ... It is plain and obvious that the plaintiff was collecting in advance the purchase price which it was prohibited from collecting under reg. 11. The option fee is therefore a guise to circumvent the mandatory G requirement of reg. 11(2). That being the case, it is clear that the option for sale is an agreement prohibited by law.
>
> [14] It matters not that the payment was placed with the stakeholder as contended by counsel for the plaintiff. The fact as contended by the plaintiff, that despite becoming aware of such arrangement, the Housing Ministry takes no action on the plaintiff, does not make an illegal contract H to become legal. Consideration which is forbidden by law is not lawful as provided under s. 24 of the Contracts Act. An agreement with unlawful consideration and whose object is unlawful is void and unenforceable under s. 25 of the Contracts Act.
>
> [15] In *MK Retnam Holdings Sdn Bhd v. Bhagat Singh Surian Singh* [1985] I 1 CLJ 520; [1985] CLJ (Rep) 199; [1985] 2 MLJ 212 the Supreme Court held that an agreement which is in violation of the letter and spirit of the Housing Developers (Control and Licensing) Rules 1970 should not be

allowed to stand. The option to sell agreement in the present case is in our view an agreement whose admitted aim was to defeat the object of the regulation and should not be enforced by the court.

[24] The defendant relied on the Court of Appeal case of *Audrey Gertrude De Souza v. Sunway D' Mont Kiara Sdn Bhd* [2015] 4 CLJ 853 which held that a decision to render the contract between the parties null and void because of a contravention of the Regulations would not serve the object of protecting the purchaser:

In this case, use of Form H instead of Form G was a contravention as to the form of the SPA to be used for the contract between the parties for the purchase of the bungalow and courtyard property. However, the contravention did not go to the substance of the contract. The mandatory language of reg. 11(1) of the Regulations prescribing the use of Form G or Form H did not extend to declaring that the contract under any other form other than Form G or Form H would render it null and void. Instead s. 22 provides that a contract was not voidable because it was caused by a mistake as to any law in force in Malaysia such as when the wrong form was used. Since the contravention as to the form to be used did not affect the object of the contract between the parties, being the delivery of a bungalow with a courtyard on Lot 16 as contracted, the contravention did not render the contract between the parties to be null and void.

Under s. 24 of the Act, the Minister was given the discretion to make the Regulations for the purpose of carrying into effect the provisions of the Act. The purpose of the Act was to provide for the control and licensing of the business of housing development in Peninsular Malaysia with provisions designed to protect the purchaser and to ensure delivery of the house or unit contracted for. As such, a decision to render the contract between the parties null and void because of a contravention of the Regulations would not serve the object of protecting the purchaser and ensuring delivery of the house in accordance with the contract.

[25] I do not agree with the plaintiff's contention that the fact the defendant did not have an advertising permit and developer's license for one of the terrace units (PT 1706) at the date of the share sale agreement gives rise to an issue to be tried. The relevant time when the advertising permit and developer's license is required is when the SPAs are to be dated or when Ardent's project is to be launched which has yet to happen. It is provided in the share sale agreement that the balance purchase price shall be a debt due and owing to the vendor by the purchaser until the vendor is in receipt of the same in the mode and manner as described and detailed in the fifth schedule. And in the fifth schedule it is contemplated that the defendant shall pay the purchase price for the properties after the SPA and MOT are dated because it is only then that the sale and purchase agreements will have come into existence. And the relevant date is 24 months from the date when the portion 1A of the IWSS IA shall actually be completed and commissioned

or 12 months from the launch of sale of the project, whichever is earlier. Until the SPA are dated, there is no sale of the properties and the question of the advertising permit and the developer's license does not come into the picture yet.

[26] The plaintiff further contended that the defendant had admitted that it had made an application to change the building plan and this has the effect of disabling the defendant from performing the terms of the share sale agreement. The defendant does not deny that it had applied for approval of the change of the building plan and has said that the approval affected the terrace units. It is the contention of the plaintiff that the defendant has thereby disabled itself from performing the terms of the share sale agreement as the change of plan will change the terrace houses from 2½ storeys to three storeys. The defendant merely responds to say that the plaintiff's contention that the defendant is unable to fulfil its obligations under the share sale agreement is speculative. The defendant has shown that the conditional approval of the change of plan was only valid for a year which has expired already on 30 October 2018. The plaintiff submitted that the defendant in its affidavits did not aver that the approval had already expired but that fact can clearly be seen from the approval letter itself which is an exhibit. Accordingly, at this juncture, there can be no change of building plan as the approval had lapsed and the contention that the defendant is unable to fulfil its obligations under the share sale agreement is speculative.

[27] If the defendant had really disabled itself from performing the terms of the share sale agreement with regard to the terrace units, would the plaintiff be entitled to rescind the agreement?

[28] In *Tan Tien Seng & Anor v. Grobina Resorts Sdn Bhd* [2005] 7 CLJ 70; [2005] 7 MLJ 590, it was held as follows:

> [41] In my judgment, the resolution to the above diverging submissions may be found by restating the cardinal principles which the courts have applied in order to determine whether in a particular situation there is a fundamental breach or a breach of a fundamental term and for the purposes of this judgment, I shall use both of these expressions interchangeably.
>
> (1) The concept of fundamental breach is common law in origin;
>
> (2) This common law has to a great extent now found expression in statutory form in s. 40 of the Contracts Act 1950 (s. 40) which reads as follows:
>
> > When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promise may put an end to the contract unless he has signified, by words or conduct his acquiescence in its continuance.
>
> (see also Hwa Chee Lin at p. 551 per Suriyadi J)

(3) The question whether or not a breach is fundamental may be found by referring to two alternatives *viz* the importance that the parties would seem to attach to the term which has been broken or to the seriousness of the consequences that have in fact resulted from the breach, and both these alternatives may have a part to play as the decisive element or elements: see *Cheshire, Fifoot and Furmston's Law of Contract* (2nd edn) by Andrew Phang Boon Leong p. 898;

(4) Application of the first test calls for and depends on the construction of the contract in question, at the time when it was made, the surrounding circumstances and the intention of the parties, as gathered from the instrument itself: *ibid* p. 898 and *Bentsen v. Taylor, Sons & CVo (No 2)* [1893] 2 QB 274 at p. 281 per Bowen LJ

...

(7) In Malaysia the test of essentiality has been expounded by Visu Sinnadurai (later J) in *The Sale and Purchase of Real Property in Malaysia* 1984 at pp 345 and 346 where it was stated that a party to a sale of land may rescind the contract if the other party has breached an essential obligation of the contract for sale and that the essential obligations of a vendor include the delivery of a property as described in the contract.

(8) A breach of an essential term of the contract goes to the root of the contract and entitles the injured party to rescind and recover the payment made under the contract for failure of consideration: s. 34(1)(a) of the Specific Relief Act 1950; *The Law of Restitution* by Lord Goff and Gareth Jones, 1993 P 417; *Hwa Chee Lin* per Suryadi J; *Lim Sew Lan v. Pembangunan Hysham Sdn Bhd & Anor* per Kamalanathan Ratnam J; and *Lee v. Rayson*

[29] The plaintiff's claim is premised on s. 40 of the Contracts Act 1950 which provides that: "When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

[30] In *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269, the Court of Appeal said this:

Special attention should be paid to the phrase "his promise in its entirety." Under the section the right in a non-defaulter to repudiate a contract only accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract.

[31] In the present case, assuming the defendant has disabled itself from performing its obligations under the share sale agreement in respect of the terrace units, the defendant would still have partially performed its obligations under the share sale agreement in paying the sum of RM137,000 to the plaintiff and in fulfilling its obligations in respect of the townhouse. In that case, the plaintiff should not be entitled to rescind the share sale agreement.

[32] Lastly, the plaintiff alleged that the defendant had breached s. 123 of the Companies Act 2016. This provides that a company shall not give any financial assistance, whether directly or indirectly and whether by means of a loan, guarantee or the provision of security or otherwise, for the purpose of or in connection with a purchase or subscription made or to be made by any person or for:

(i) Any shares in the company; or

(ii) In the case where the company is a subsidiary, any shares in its holding company or in any way purchase, deal in or lend money on its own shares.

[33] The plaintiff contends that pursuant to the settlement agreement, Ardent had given financial assistance to the defendant in order for the defendant to purchase shares in Ardent in which the defendant is a shareholder.

[34] I do not agree with the plaintiff's contention. I am of the view that there is no breach of s. 123 of the Companies Act 2016. The plaintiff's contention ignores the rationale of the payment arrangement as set out in the settlement agreement which can be summarised as follows:

(i) At the time of the share sale agreement, Ardent was owing RM9,445,778.56 to the defendant;

(ii) Pursuant to the share sale agreement:

(a) The defendant owes the plaintiff the balance purchase price totalling RM4,518,000; and

(b) The plaintiff owes Ardent the purchase price for the terrace units and townhouse amounting to RM4,518,000.

[35] Therefore, the parties agreed to set off or contra their respective debts by way of the defendant paying to Ardent the purchase price for the terrace units and townhouse on behalf of the plaintiff.

[36] In *Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors* [1997] 3 CLJ 421, Augustine Paul J (as he then was) held:

> [4] ... Accordingly, if the transaction was a *bona fide* commercial transaction entered into in good faith, the fact that the proceeds of the transaction was used to assist in acquiring the company's shares would not make the transaction illegal.

[37] Even if there is breach of s. 123, s. 124 provides that if a company gives financial assistance in contravention of this subdivision, the validity of the financial assistance and of any contract or transaction connected with the financial assistance is not affected only because of the contravention. In *Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors* [1997] 3 CLJ 421, it was held that any transaction entered into in breach of s. 67 of the Companies Act 1965 (which is in *pari materia* with s. 123 of the Companies Act 2016) would still be valid and enforceable. This is what the court said:

> [6] Section 24 of the Contracts Act 1950 provided that if an agreement was forbidden by law or prohibited by law or was of such a nature that it would defeat the law, that agreement would be unlawful and void. However, a contract which is prohibited by statute does not become void and unenforceable if the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. Section 24 cannot then apply to such a contract as the statute itself had saved the contract which would otherwise be forbidden. It is only in a rare situation in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable. Section 67 is one of the instances of such rare exercise of legislative power. The Court held that as s. 67(3) prescribed penalties for a breach of s. 67(1) and section 67(6) provided remedies for the breach and, furthermore, having regard to the context and purpose of s. 67(1) any transaction entered into in breach of the section would be valid and enforceable. In the circumstances, the transaction in this case does not become void and unenforceable.

[38] Accordingly, the alleged breach of s. 123 of the Companies Act 2016 is also not an issue to be tried.

[39] In all the circumstances of the case, I am of the view that this is a plain and obvious case where the plaintiff's claim should be struck out. I have therefore allowed the application to strike out the plaintiff's action.